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No. 85-94 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,
Petitioner,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; ARNOLD LEVIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN; and FINE KAPLAN & BLACK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS RAWLE & HENDERSON and FINE KAPLAN & BLACK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, under Pennsylvania law, liability for legal malpractice should be imposed upon lawyers for alleged failure to give adequate notice of a settlement of a class action case to a member of the class, where the notice procedure they followed concededly complied with the requirements of the trial court's order governing notice, the applicable Rules of Civil Procedure, and the United States Constitution, and where no previous case or other authority has ever imposed such liability?

STATEMENT PURSUANT TO RULE 21.1(b)

Avram G. Adler, Marvin I. Barish, and Howard J. Creskoff are listed by Petitioner among the Respondents on the cover of the Petition for a Writ of Certiorari; but those individuals were dismissed from the case in the District Court by stipulation of the parties and order of the District Court, and they were not parties to the proceedings in the United States Court of Appeals for the Third Circuit. Otherwise, the cover of the Petition accurately lists the parties.

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COUNTERSTATEMENT OF THE CASE

This is a diversity legal malpractice case. The plaintiff, Zimmer Paper Products Incorporated ("Zimmer"), was a class member in the *Glassine and Greaseproof Paper Antitrust Litigation*, M. D. L. Docket No. 475 (the "Antitrust Litigation"), a price-fixing case brought on behalf of purchasers of glassine and greaseproof paper

against six manufacturers and sellers of such paper and ultimately settled. Zimmer later brought the present case against counsel for the class, claiming that, because of class counsel's negligence, Zimmer had failed to file a proof of claim in the Antitrust Litigation and therefore had not shared in the settlement proceeds. This case was assigned to the Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, who had also been the trial judge in the Antitrust Litigation.

Zimmer claimed in its Complaint that it had not received any notice of the settlement of the Antitrust Litigation or of the requirement that it file a proof of claim. Discovery showed that an initial notice to class members in the Antitrust Litigation was dated June 1, 1981, and was sent, pursuant to an order by Judge Pollak, by first class mail and by publication in all regional editions of *The Wall Street Journal*. C.A. App. 32-33.[1] That notice informed class members of the institution of the Antitrust Litigation, partial settlements, their membership in the class, and the procedures to follow if they wished to opt out. [C.A. App. 34-37]. Zimmer's name appeared seven times on the computer-generated list of prospective class members (because its name appeared on the Antitrust Litigation defendants' customer lists in seven slightly different variations, including addresses in both Indianapolis and San Francisco), and Zimmer admits to having received six of those notices, some in each city. [C.A. App. 102, 273-75, 314].

After class counsel had achieved proposed settlements with the remaining defendants, class counsel sent, pursuant to an order by Judge Pollak, a November 10, 1981 notice of the settlements and of the plan for distribution of the fund, along with proof of claim forms,

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1. Citations to "C.A. App." are to the Appendix filed in the United States Court of Appeals for the Third Circuit.

to all class members (over 1500 of them) in the same manner as on June 1 — by first class mail and by publication in *The Wall Street Journal*.

Discovery showed that class counsel had hired the same reputable and experienced companies to accomplish the mailings of both the June 1 and November 10 notices. Zimmer's name appeared on seven gummed mailing labels on the November 10 list just as it had on the June 1 list. The labels were generated on a fan-folded backer and, even though Zimmer later claimed that it had not received notice, class members whose labels appeared on the same page as Zimmer's and on the page before Zimmer's obviously received notice because they filed proofs of claim. The evidence showed that the mailing was accomplished with due care, including the mailing of seven notices to Zimmer. [App. to Pet. for Cert., 25-26].

Zimmer claims that it never received a notice (although Zimmer did subscribe to *The Wall Street Journal* at the time the notice was published), and it never filed a proof of claim. C.A. App. 97. Nine months after the settlement proceeds had been distributed to those class members who had filed proofs of claim, Zimmer started this suit.

Judge Pollak granted partial summary judgment for the defendants on some of Zimmer's claims and later, after much discovery, granted summary judgment on the rest. The United States Court of Appeals for the Third Circuit affirmed Judge Pollak's decisions in their entirety, holding that class counsel were not liable for legal malpractice where they had fully complied with the District Court's order providing for notice to the class, had observed the requirements of Rule 23, and had satisfied the standards for due process. The Third Circuit said:

> Once a court, whose discretionary order is presumptively valid, has properly sanctioned such a notice

> procedure, moreover, a complaining party faces a standard at least as high as abuse of discretion in seeking to show malpractice by counsel who followed the court's order. There is no basis in the record for saying that the circumstances here support any such conclusion. App. to Pet. for Cert., 12.

The Court also made very clear that its decision was narrow and based upon the facts of this case:

> We do not hold today that first-class mail and publication will always suffice, either under a due process or a fiduciary duty analysis. App. to Pet. for Cert., 12.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari asks this Court to reverse the courts below on a question of Pennsylvania state law. Not only is there no question of federal law involved here, but the decision of state law by the courts below is not in conflict with any decision of any other court, state or federal. The courts below considered a detailed factual record which makes this case in most respects sui generis, and the case does not present an issue of general importance. On the contrary, it presents a narrow question which has not been the subject of litigation in the state or federal courts. Moreover, the decision of the lower courts was correct.

ARGUMENT

I. THERE IS NO FEDERAL QUESTION AND NO CONFLICT WITH OTHER COURTS

Zimmer brought this suit in the District Court solely under diversity of citizenship jurisdiction, seeking damages under state law for legal malpractice. It is undisputed that in the Antitrust Litigation class counsel gave the notice which the District Court's order authorized —

first class mail and publication in *The Wall Street Journal*. Zimmer is not now arguing that Judge Pollak's order violated Federal Rule of Civil Procedure 23(e) or the requirements of due process. Nor could it. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 173-77 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Thus, Zimmer's Statement of the Question Presented concedes that class counsel satisfied both Rule 23 and the requirements of due process.

Zimmer asks this Court to overrule the courts below on a question of state law.[2] This Court has observed that:

> . . . [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts . . . .

Huddleston v. Dwyer, 322 U.S. 232, 237 (1944).

In Pennsylvania, where class counsel principally practice and where the Antitrust Litigation was brought and settled, actions for legal malpractice are governed by the state common law of negligence. *E.g., Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983). A Pennsylvania appellate court recently affirmed that issues of "legal malpractice . . . should be decided upon common law negligence theories." *Brennan v. Reed, Smith, Shaw & McClay*, 304 Pa. Super. 399, 413, 450 A.2d 740, 747 (1982). The same is true of a claim for breach of a fiduciary relationship. *E.g., Ruth v. Crane*, 392 F. Supp. 724 (E.D. Pa. 1975), *aff'd mem.*, 564 F.2d 90 (CA3 1977).

The decision below, affirming Judge Pollak's holding that class counsel had not breached any duty to Zimmer, does not conflict with any other decision, state or federal.

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2. The facts that this claim arose out of conduct of counsel in federal litigation and that the fedral courts have a general supervisory control over the conduct of counsel in federal court do not alter the state law character of Zimmer's claim for relief and does not change the fact that jurisdiction is based solely on diversity of citizenship. *E.g., Gans v. Mundy*, 762 F.2d 338 (CA3 1985).

In fact, Zimmer's claim that class counsel owes a duty to provide notice beyond the requirements of Rule 23 and due process appears to be unique; we have found no case which resembles it, and Zimmer itself styles its claim as one "of first impression," Pet. for Cert., 5. Even if there were such a case, however, this case is sufficiently fact-specific to make it unlikely that any holding by this Court could have general applicability. The opinion of the Court of Appeals shows on its face that the result turns on the unique facts of this case. App. to Pet. for Cert., 12-13 and n.8.

II. THERE IS NO ISSUE OF GENERAL IMPORTANCE AND THE CASE BELOW WAS DECIDED CORRECTLY

In this Court, Zimmer argues only that class counsel had a fiduciary duty to "assure" that Zimmer received the November 10 notice by doing more than carrying out Judge Pollak's order concerning notice to the class.

Under Pennsylvania law, a plaintiff must prove that a lawyer has failed to exercise ordinary skill and knowledge before he can recover on a malpractice claim. *Schenkel v. Monheit,* 266 Pa. Super. 396, 405 A.2d 493 (1983); *Gans v. Mundy,* 762 F.2d 338 (CA3 1985). There were more than 1500 class members in the Antitrust Litigation. In accordance with Judge Pollak's order, Zimmer and the rest of the class members had received the June 1, 1981 notice by first class mail, as well as by publication in all regional editions of *The Wall Street Journal,* informing them of the institution of the Antitrust Litigation, the partial settlements, their membership in the class, and the procedures to follow if they wished to opt out. When it came time to notify the class of proposed additional settlements and a plan for distribution of the settlement fund in November, 1981, Judge Pollak again approved notice by first class mail and publication in *The Wall Street Journal.* Both of the courts

below held that class counsel accomplished the November mailing without negligence, and Zimmer's Petition does not ask this Court to review that holding.

This Court has already held that first class mail and publication satisfy both due process and Rule 23, *Phillips Petroleum Co. v. Shutts*, ____U.S.____, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985), and Judge Pollak's order, which class counsel carried out, was in accord with those standards. Zimmer claims, however, that class counsel owed it more than the carrying out of the trial court's order, fulfillment of the requirements of Rule 23, and satisfaction of due process. It argues that, because only 12% of the class members filed proofs of claim (which the record shows is an average return), class counsel should have followed up and attempted to communicate with the remaining 1350 class members (or at least with Zimmer).

Contrary to what Zimmer's Petition says, there is nothing in the record to suggest that class counsel knew the amount of each class member's potential claim or of Zimmer's potential claim. Proofs of claim often require claimants to prove their claims from numerous transactions involving many documents scattered among the books and records of a company, and that might be one among several reasons (including the potential claimant's own neglect) why a class member which had not opted out of a class might not file a claim. In this case the number of proofs of claim filed was well within a predictable range, and class counsel had no reason to think that the mailing had been ineffective, which in fact it had not. Newberg, *Class Actions*, Appendix 8-4, Table I at 206-09 (2d ed. 1985).

Zimmer asserts in its Petition that "it is part of the fiduciary obligation of the class attorney *to assure* that the client receives the information," Pet. for Cert., 13 (emphasis added). We are aware of no case in any jurisdiction which has imposed that burden on class counsel. Nor has Zimmer identified such a holding.

Class counsel caused seven copies of the November 10 notice to be mailed to Zimmer and, just as Zimmer received six copies of the June 1 notice, Zimmer probably received it, together with the published notice in *The Wall Street Journal*. To require class counsel in this case to follow up with every class member who did not file a proof of claim, or to calculate each class member's potential claim before the class member has done so, would create obligations which have not existed before. The holdings of the courts below that by carrying out the orders of the supervising judge and giving the members of the class the notice to which Rule 23 and due process entitled them, the respondents exercised the skill and knowledge customarily employed by class action practitioners were correct and in any event certainly do not present the sort of extreme and exceptional case that might warrant review.

CONCLUSION

The question presented is a question of state law, does not involve any conflict among any courts, involves a unique and fact-specific inquiry, and was decided correctly by the courts below. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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